

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

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**MAIL PROCESSING NETWORK  
RATIONALIZATION SERVICE CHANGES, 2012**

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**Docket No. N2012-1**

**AMERICAN POSTAL WORKERS UNION, AFL-CIO,  
MOTION TO STRIKE A PORTION OF THE USPS REPLY BRIEF  
(July 24, 2012)**

The American Postal Workers Union, AFL-CIO (APWU) respectfully moves to strike in its entirety subsection “E. Supplement” on page 67 of the Postal Service’s Reply Brief filed in this docket on July 20, 2012. In this subsection the Postal Service presents new information that is not in the evidentiary record created for the Commission’s consideration of the Mail Processing Network Rationalization (“MPNR”) proposal at issue in this case. Not only is this information inappropriate extra-record evidence, it also cannot be properly admitted as evidence at this late stage, after the record has been closed, and after parties have filed Reply Briefs. To permit the inclusion of extra-record evidence, which has not been subject to examination by the participants in this docket, violates a fundamental tenet of due process guaranteed by Section 3661 of Title 39. The Postal Service is plainly aware of the problems that are associated with extra-evidence recognizing in its Motion to Strike a Portion of the Initial Brief of the Public Representative, filed July 20, 2012 that:

Without a timely opportunity to review the data and analysis underlying the figures, probe them through existing discovery processes, and submit rebuttal testimony, the Postal Service has no meaningful way to challenge the PR’s calculations at this late date. Nor does the Commission have any principled way to assess their validity.

Likewise, without a timely opportunity to review the Postal Service’s new calculations of the impact on revenue and volume resulting from MPNR, and without the chance to probe these revisions through existing discovery processes, the APWU and other participants

have no meaningful way to challenge the Postal Service's revised estimates. In fact, because the Postal Service waited until the absolute last minute to announce the revised volume and revenue estimates, providing this information the same day that reply briefs were due, there is not even the opportunity to comment. Furthermore, while the Commission may now have the ability to conduct its own examination of the validity of this information, there is simply no transparent way to do so, therefore, any consideration of this information by the Commission or Commission staff would also violate basic due process.

## **I. Background**

On December 29, 2011, the Presiding Officer issued Presiding Officer's Information Request (POIR) No. 1, question 18a, which requested that USPS witness Elmore-Yalch explain how missing survey responses were accounted for in various data sets that were created by Ms. Elmore Yalch and Opinion Research Corporation (ORC) and used by USPS witness Whiteman to estimate the impact of MPNR on mail volume, revenue, and overall change in revenue contribution. Ms. Elmore-Yalch provided a response on January 13, 2012, four days after the POIR's due date. The Presiding Officer followed up her inquiry about the treatment of missing survey responses by issuing POIR 4, question 10 on February 8, 2012. Ms. Elmore-Yalch provided a timely response on February 21, 2012. On May 31, 2012 the Presiding Officer issued POIR 9, question 1, which again requested information necessary to replicate Ms. Elmore-Yalch's quantitative research results. The POIR specifically required:

In order to facilitate inclusion of the requested material in the evidentiary record, the Postal Service shall have a witness attest to the accuracy of the answers and be prepared to explain, to the extent necessary, the basis for the answers at the hearings. Responses shall be provided no later than June 7, 2012.

Yet as of the June 28, 2012 hearing, a response to POIR 9, question 1 was still outstanding. The Presiding Officer addressed this at the hearing and proposed an alternative request, presumably in hopes of finally receiving the information sought regarding the ORC's quantitative market research calculations. In response, Ms. Elmore-Yalch indicated that this information was readily available, stating: "[w]e actually have

that. We keep a program file and a log of everything that we did.” Tr. 12/4484. Despite the self-proclaimed availability of the requested data, Ms. Elmore-Yalch’s response to the POIR 9, question 1, as amended during the June 28, 2012 hearing, was not provided until after the Commission filed yet another order requesting this information (Order No. 1406) and only hours before the deadline for Reply Briefs on July 20, 2012.

Furthermore, the response to POIR 9, question 1 casually included an “addendum” which disclosed for the first time that ORC “discovered an error in the forecast for consumers that served to increase consumers’ apparent response to changes in First-Class Mail service standards.” The addendum included a table detailing the “corrected” consumer volume forecast estimates.<sup>1</sup> Neither Ms. Elmore-Yalch, nor Mr. Whiteman provided revisions to any other calculations that were impacted by this error, including Mr. Whiteman’s revenue estimates. Nevertheless, the Postal Service included these new, untested revenue loss estimates for MPNR resulting from correcting the error in its forecasts for consumers, for the **first time**, in its **Reply Brief**, submitted a mere 17 minutes before the final brief filing deadline.

## **II. The Extra-Record Evidence in the Postal Service’s Reply Brief Must Be Stricken**

Section 3661(c) of title 39 mandates that “[t]he Commission shall not issue its opinion on any proposal until an opportunity for hearing on the record under sections 556 and 557 of title 5 has been accorded to the Postal Service, users of the mail, and an officer of the Commission who shall be required to represent the interests of the general public.” Sections 556 and 557 of title 5 mandate that the Commission’s advisory decision in any Section 3661 docket be based on the record evidence produced in that case. These sections of the Administrative Procedures Act further provide that “[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full

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<sup>1</sup> Confusingly, the table representing the original Consumer Volume Forecasts in Ms. Elmore-Yalch’s testimony as depicted in the POIR 9, question 1 addendum, does not match what is actually found in the Consumer Volume Forecast table on page 52 of Ms. Elmore-Yalch’s direct testimony.

and true disclosure of the facts.” 5 U.S.C. § 556(d). Thus, as the Postal Service rightly notes in its Motion to Strike

[i]f interested parties/observers are to have faith in the Commission’s advisory opinion, it must ensure that the opinion is a product of a process that satisfies the procedural requirements currently in place under the Commission’s Rules of Practice & Procedure.

(Motion to Strike at 1).

The Commission’s Rules of Practice and Procedure provide a means for determining what information produced in a Commission proceeding is appropriately included as evidence in the record established for its consideration under Section 3661 of title 39. See 39 CFR §§ 3001.20, 3001.25, 3001.30 and 3001.31. For example, Rule 30(e)(2) provides a means for designating interrogatory responses to be included in the evidentiary record; and Rule 20a(c) details the evidentiary status of information submitted by limited participants, requiring that this information can be included in the evidentiary record **only** if it is “subject to cross-examination *on the same terms applicable to that of formal participants.*” 39 C.F.R. § 3001.20a(c) [Emphasis added].

In the instant case, the Postal Service has included extra-record evidence in its Reply Brief. In doing so, the Postal Service has violated the due process rights of the APWU and other participants who have participated actively and worked tirelessly on this case since it began in early December 2011. Although the revised revenue estimates presented by the Postal Service in its Reply Brief may not amount to a substantial change to the rational put forth by the Postal Service in support of its MPNR proposal, it is important that this information be excluded from the Commission’s consideration because these new estimates have not been subject to any examination by the participants.

In its “addendum” to Ms. Elmore-Yalch’s response to POIR 9, question 1, as amended June 28, 2012, the Postal Service admitted to an error in its consumer volume and revenue calculations, but it failed to provide a description of how this error could have occurred or why it was only identified now, months after filing Ms. Elmore-Yalch’s direct testimony. There has been no information provided about the extent of this error and whether it also impacted the preliminary results of the quantitative market research in

Phase 1.<sup>2</sup> Yet no meaningful opportunity to make these inquiries or to otherwise examine the new volume and revenue estimates is possible now as the Presiding Officer closed the evidentiary record in this case on July 5, 2012 (Docket No. N2012-1, Presiding Officer's Ruling No. N2012-1/74, at 3 (July 5, 2012)). The revised revenue estimates contained in the Postal Service's Reply Brief are not in the record, and for the reasons discussed below, cannot be admitted to the record at this late date, therefore, the Commission must not give any weight to this information in its Advisory Opinion and should strike this portion of Postal Service's Reply Brief.

### **III. The Extra-Record Evidence Relied on by the Postal Service in its Reply Brief Cannot Be Properly Included in the Record**

Having failed to receive a response from the Postal Service to POIR 9, question 1 as amended, on July 18, 2012, the Commission issued Order No. 1406 directing the Postal Service to provide a response to this question. Although this Order explicitly noted that "the Presiding Officer has indicated that, if necessary, the record may be reopened to ensure inclusion of all necessary materials" (Order No. 1406 at 3, quoting Presiding Officer's Ruling No. N2012-1/74, Presiding Officer's Ruling Incorporating Final Designations into the Record and Closing the Evidentiary Record, July 5, 2012), witness Elmore-Yalch's response to POIR 9, Question 1 and the additional extra-record information contained in the Postal Service's Reply Brief cannot now be added to the record without assailing the due process rights of the APWU and the other participants in this case.

Commission precedent clearly supports this conclusion. For example, in Docket No. R2006-1 the Commission declined to admit into the evidentiary record material received after the record had closed which updated information previously supplied by the Postal Service. This situation directly mirrors the present case; accordingly, the Commission's rationale for declining to admit this information is equally applicable here.

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<sup>2</sup> There has been no indication by the Postal Service on the record, or in extra-record evidence that the Phase 1 quantitative research was also flawed, therefore, it must be assumed that the Phase 1 quantitative research does not suffer from the same error reported by Elmore-Yalch in her response to POIR 9, Question 1, and any inference to the contrary must be disregarded.

In ruling that these responses should not be included in the evidentiary record, the Commission in Docket No. R2006-1 noted that the responses were offered too late to “afford the intervenors the full panoply of procedural due process rights,” which includes the rights to “cross-examine the attesting witnesses, and prepare rebuttal evidence.” (Docket No. R2006-1, Order No. 1482: Accepting Certification and Sustaining, in Part, Objection of Intervenors to Designation of Responses to Presiding Officer’s Information Requests For Inclusion In the Record at 3-4 (November 8, 2006)). Similarly, the revised volume and revenue estimates provided by the Postal Service in this case, provided not just after the close of the record, but on the same day that Reply Briefs were due in this case, is simply too late for inclusion in the evidentiary record in this case as participants have not been afforded **any** procedural due process rights, let alone the full panoply.

Furthermore, the new information provided by the Postal Service also cannot be admitted into the record as a supplement to a prior discovery response. Rule 26(f) of the Commission’s Rules of Practice and requires that

[t]he individual or participant who has answered interrogatories is under the duty to seasonably amend a prior answer if he/she obtains information upon the basis of which he/she knows that the answer was incorrect when made or is no longer true. Participants shall serve supplemental answers to update or to correct responses whenever necessary, **up until the date the answer could have been accepted into evidence as written cross-examination.** Participants filing supplemental answers shall indicate whether the answer merely supplements the previous answer to make it current or whether it is a complete replacement for the previous answer. [emphasis added.]

Discovery closed in this case on July 5, 2012, over two weeks before the Postal Service provided this additional information. Even if it is a supplement or a complete replacement for information already in the record, there is no requirement that it be included in the record. Instead, under the Commission’s rules it clearly is untimely and is properly excluded from the record.

Given the recent submission of comments in Docket RM2012-4, established to consider modern rules of procedure for nature of service cases like the present case, it bears noting that had the Postal Service provided more transparency during the review of its proposal throughout this proceeding and provided discovery responses in a timely manner, the situation we are currently presented with would not have occurred. In fact,

as we noted in our Initial and Reply Comments in Docket RM2012-4, the due process requirements of Section 3661 are clearly established, cannot be lawfully restrained, and adequate time is required to ensure that these rights have been properly afforded. If the Postal Service wants a quicker decision it must change its behavior, be more transparent, file responses timely, not impose by rule, or as in this case, by action, an unlawful restriction of due process.

For example, POIR 9, question 1 was issued on May 31, 2012, almost two months ago. Had the Postal Service timely complied with the POIR established deadline of June 7, 2012, the evidentiary record would have still been open, participants and the Commission would have been able to address the revised estimates at the June 28, 2012 hearing and the basic due process rights of all parties could have been afforded. However, because the Postal Service delayed review of its analysis, and failed to provide a timely response to the Presiding Officer, even to the request as revised at the June 28<sup>th</sup> hearing, despite assurances from Ms. Elmore-Yalch that the information was readily available, the due process rights of the participants will be violated if this information is permitted to remain in the Postal Service's Reply Brief or moved into the record evidence.

This would require additional time and possible delay of the Commission's advisory opinion that no party desires. If the new evidence had the potential to materially affect what the Commission might advise or recommend; the Commission might want to find an appropriate procedure for examining and including the evidence in the record. We do not believe that is the case here. This situation is of the Postal Service's making; thus any consequences are rightly borne by the Postal Service, and should not be shifted onto the participants through the deprivation of our due process rights.

#### **IV. Conclusion**

For the foregoing reasons and those supported by the Commission's rules and precedent, the Commission to grant this motion and strike page 67 of the Postal Service's Reply Brief in its entirety.

Respectfully submitted,

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